Supreme Court of the United States.

No. 75.—October Term, 1905.

The Guardian Trust and Deposit Company and The Guarantee Trust and Deposit Company, Petitioners, vs. B. J. Fisher, A. M. Scales, Assignee of A. A. Hinkle; A. M. Scales, Assignee of Hodgin, Pegram & Co., and Helen G. Brown.	On writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 2, 1906.]

Section 1255 of the Code of North Carolina of 1883 reads:

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the State against such incorporation, for labor performed [nor for material furnished such incorporation], nor for torts committed by such incorporation, its agents or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This was subsequently amended by leaving out the matter enclosed in brackets.

In 1887 a corporation was organized under the laws of North Carolina, which soon after secured the passage of an ordinance by the city of Greensboro, giving to it the exclusive right to the use of the streets, sidewalks and public grounds for the purpose of constructing, operating and maintaining a complete system of waterworks. A later ordinance provided that "said water company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in the construction or operation of their plant."

The corporation constructed the waterworks and also executed a mortgage or deed of trust, conveying its entire property and plant to secure the payment of fifty thousand dollars of bonds. A subsequent mortgage or deed of trust was foreclosed and the title to the property passed to a new corporation, subject to the lien of the first mortgage. After its purchase the new corporation executed a further mortgage or deed of trust. Subsequently two fires occurred, destroying property belonging to the respondents. Actions were commenced in the Superior Court of Guilford County by the

and particularly the Allegations 15, 16, 17, 18 and 19 of said complaint, which are embodied in the opinion of the Supreme Court of North Carolina, in said case, *supra.*)

The Greensboro Water Supply Company's liability in this case to the judgment claimants as inhabitants, property-owners and tax-payers in the City of Greensboro is based upon two-fold ground:

First.—Corporations enjoying public franchises and engaged in public employment, for which they receive toll, owe a duty to the public as well as to each *individual*, to perform the duties undertaken and incident thereto, which duty, in this case, was almost exclusively to furnish a sufficient *pressure* of water to extinguish fires.

Second.—This obligation, raised by the law, is added to and superinduced by the provisions of the contract under which the corporation is acting.

It will hence be observed that the causes of action upon which respondents' judgments are based do not rest merely upon a negligent breach of the contract, but also a negligent *non-performance* of a common law duty imposed and stamped upon a *quasi* public corporation which undertakes for a profit to carry on a business; and we maintain that the complaints filed in the respondents suits in the State Courts allege facts sufficient to sustain an action in *tort* even independent of the contract.

Perhaps the clearest statement of the law giving respondents right to sue in *tort* upon a breach of contract is found in Addison on Torts, Wood's Edition, Section 1288:

"Where a contract creates a duty, the *neglect to perform that duty*, as well as the negligent performance of it, is a ground for action of *tort*. Both the non-feasance and misfeasance constitutes a wrongful act for which the remedy is by action of contract, or of tort *at the opinion of the party injured.*"

And at Section 27, of the same work, it is said:

"A tort may be dependent upon or independent of contract. If a contract imposed a legal duty upon a person, the *neglect* of that duty is a tort founded upon contract, so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for a breach of duty, may be brought at the *option* of the plaintiff."

Following are the definations of tort as given by the leading authors on that subject:

"Tort is an act or *omission* (not being merely a breach of

a duty arising out of a personal relation or undertaken by a contract) which is related to harm suffered by a determinate person in one of the following ways:

"*a.* It may be an act in itself contrary to law, or an *omission* of specific duty which causes harm not intended by the person so acting or *omitting*.

"*b.* It may be an act or *omission* causing harm which the person so acting or omitting did not intend to cause, but might or should, with due dilligence, have foreseen and *prevented*.

"*c.* It may, in special cases, consist merely in *not avoiding or preventing harm* which the party was bound absolutely, or within limits, to avoid or prevent."

Webb's Pollock on Torts, 20.

Bigelow on Torts, at page 11, classifies the subject as follows:

1. The doing of a lawful act by unlawful means.
2. The doing of an unlawful act.
3. Events or conditions caused by *neglect or breach of duty*.

It is the latter class of torts which is the basic principle of the respondents cause of action.

"Where a body of persons, incorporated or not, are entrusted with the management or maintenance of work, or the performance of duties of a public nature, they are, in their corporate or *quasi* corporate capacity, responsible for the proper conduct of their undertaking no less than if they were private owners, and this whether they derive any benefit from the undertaking or not.

Webb's Pollock on Torts, pages 69 and 70, and cases cited.

We have seen that from the relation of the Water Company as a *quasi* public corporation to the inhabitants of Greensboro it assumed certain common law obligations by reason of its right of eminent domain, public employment and compensation derived from the tax-payers of the City of Greensboro independent of any contract, and a non-performance of these public duties, whereby injury results to person or property *is a tort*.

"Whenever facts and circumstances can be shown to exist

which creates a duty on the part of the defendant towards the plaintiff, and there has been a breach of that duty and a consequent damage to the plaintiff, an action for damages may be maintained." (See Addison on Torts, Section 28.)

"When a contract has created a duty between the parties and privies, a breach of which is actionable, * * * but in addition to this the contract is either repeated or put in force, the common law duty covering the relation or situation, a party or *privy* to the contract may sue *ex contracu* for the breach of contract, or *ex delicto* for a breach of the common law duty. There is a body of law outside of the agreement of the parties prescribing the rights and defining the duties not directly contemplated by the party, but a breach of which is actionable as a tort." Jaggard on Torts, pages 23 and 28.

The petitioners contend that because there was a contract between the Water Company and the city which has been violated, that the respondents could not maintain an action for tort, but can only sue for breach of contract. In answer to this, Jaggard on Torts, page 24, very well says: "The law does not allow a party to use a violation of a contract obligation as an instrument of oppression and damage to accomplish his purpose, and then to interpose his contract as a limitation of his liability."

Did the Water Company owe the respondents a duty? Did it *negligently* fail to perform *that duty?* and what was the duty to be performed, a breach of which is complained of?

The duty owed is specifically set out in paragraphs 3, 5, 6, 15 and 19 of the complaint filed in the case of Fisher *vs.* The Greensboro Water Supply Company heretofore reported.

Did the defendant fail to perform that duty whereby the plaintiff was injured? The verdict of the several juries who tried these cases have settled this question. In their findings four contentions have been conclusively settled:

First.—That the Water Supply Company had broken its contract with the city.

Second.—That it had failed to perform the public duty which it owed to the respondents as inhabitants of the City of Greensboro, to furnish water for fire protection.

Third.—That it has negligently failed to do so.

Fourth.—That the respondents have been thereby damaged in the amount set out in the judgments filed in the Record.

The case of Boston Safe Deposit and Trust Company *vs.* the Salem Water Company, 94 Federal Reporter, 240, and

cases therein cited is made the basis of the petitioners' contention, that these actions cannot be sustained in *tort*. By examination of that case the Court will find that it differs totally from the question at issue, in that the Court says that the action was simply *ex contractu*, and that there was *no contract* between the Water Company and the plaintiff entitling him to sue for its breach.

In the case at bar it is admitted by counsel representing petitioners that the Supreme Court of North Carolina in the case of Gorrell *vs.* the Water Company reported in 124 N. C., 328, has expressly held that where a corporation undertakes to furnish water in such mode and quantity that it may be used to extinguish fires in the city in which it is to be supplied, and received compensation therefor, that damages sustained by a citizen and tax-payer by a destruction of buildings on account of the failure to furnish water, is a natural and proximate consequence of such breach or undertaking between the Water Company and the City, and entitles the tax-payer to sue in his own name for its breach, the contract having been made for his benefit.

In the case of Coy *vs.* Indianapolis Gas Company, 36 L. R. A., page 535, the question at issue was very nearly identical with the one under consideration. There the Gas Company had agreed to furnish gas under a contract for fuel, and negligently failed to do so whereby a child died from cold. The plaintiff in that case sued for the negligent nonperformance of the contract, and also for the negligent nonperformance of the common law duty which it had assumed by accepting its franchise and assuming this public duty. The point was there raised as here, that the action was *one in contract* and *not in tort*.

The Court in a very able opinion upon this point says:

"The failure of *duty* on the part of the company as alleged in the complaint *is a tort*, even though the complaint also shows the failure to comply with the contract. The contract was but a statement of the reasonable conditions under which the company was required to perform its duty. The authorities show that in such a case the action may be *on contract or in tort*. The necessary statement of facts being substantially the same in either case, the failure to perform such a contract is in itself *a tort*. The action in this case is therefore *in tort*."

Second Addison Contracts, 1119.
48 American Reports, 179.
94 Ind., 474.
Brown *vs.* C., M. & St. P. R. Co., 41 American Reports, 41.

National Bank *vs.* Graham, 100 U. S., page 702, was a case where a depositor put bonds in a bank for safe keeping, and and were accidently stolen. Graham sued the bank *in tort* for its negligence. The Court discussing the cause of action says:

"In many cases where there is a valid contract it may be regarded only as an inducement and raising a duty for the breach of which an action may be brought *ex contractu* or *ex delicto* at the option of the injured party."

It is therefore seen that the respondents were entitled to maintain their action in the State court against the Water Company as *privies to the contract* between the Water Company and the City, and also upon a *breach of the common law duty* which the Water Company owed them as inhabitants and tax-payers of the City of Greensboro, belonging to a class to whom they owed a duty implied by law, as well as expressly assumed by contract.

In all of these cases the State Court declared that the plaintiffs were entitled to judgment against the defendant Water Company for the *tortious* injuries and damages done by *the negligence* of the defendant.

In Paducah Lumber Company *vs.* Paducah Water Supply Company, 89 Ky., 340, it is held that if a water company entered into a contract with a municipal corporation whereby the former agrees in consideration of the grant of franchises, and a promise to pay certain specified prices for the use of hydrants, to construct water works of a specified character and capacity and to keep a supply of water required for domestic, manufacturing and fire protection purposes for all the *inhabitants* and *property of the city*, the tax-payer of the city may recover of the Water Company when through a *breach of its contract* he is left without means of extinguishing fire, and his property is on that account destroyed.

This case was twice decided in the Supreme Court of Kentucky and has since been affirmed by said Court in a similar case.

The Supreme Court of North Carolina has recently passed

twice upon the validity of the cause of action upon which the judgments of the Intervenors are based.

First—In the case of Gorrell *vs.* The Water Company, 124 N. C., at page 386. This was an action brought by the plaintiff against the Water Company—(the defendant in the main case)—for injuries to property. It demurred to the complaint and the demurer was overruled by the Supreme Court, which decided that a cause of action was stated and that the plaintiff, being privy to the contract between the Water Company and the City of Greensboro, could maintain the action.

Second—In the Fisher case, 128 N. C., page 375, by the *unanimous* opinion of the Supreme Court, it was held that the plaintiff had a cause of action, and that the action was brought *in tort*. Numerous authorities, including eminent works on pleadings, were cited in support of the decision of the Court. The defendant company in that case did not dispute the *right of the plaintiff to sue*, nor did they deny that he had *a cause of action*, but filed an answer controverting the facts upon which his cause of action was based. These facts were submitted to a jury upon a trial and found in favor of the plaintiff, and upon this finding of the jury these judgments are based, as fully appears from the Record filed in this cause.

In addition to this, the attention of the Court is, with great confidence, called to the fact that so learned and eminent a Judge as His Honor, Judge Simonton, after a thorough and careful investigation of the question, has filed an opinion in this cause, concurred in by His Honor, Judge Boyd, wherein the doctrine held both by the Kentucky and North Carolina Courts is upheld, and in support of his conclusions, not only these cases, but the common law doctrine hereinbefore enunciated, is fully set out.

The diligence and industry of the learned counsel for the appellants have not been rewarded by the discovery of any authority from law writers or Courts cited by them in their Brief, which controvert in the least the soundness of the doctrine laid down by Judge Simonton, as well as the Supreme Courts of Kentucky and North Carolina.

The text books, as well as the decisions of the courts of the country, lay down the doctrine, without a single exception, that:—

All contracts which have for their object private gain, and, at the same time, embrace duties and obligations of a public nature, whether to the public at large or to a particular class

owners of the property destroyed against the new corporation and judgments recovered, the judgment entries each reciting that the recovery was "for the injury and damage done him by the negligence of the defendant." 128 N. C. 375. Proceedings having been commenced in the Circuit Court of the United States to foreclose the existing mortgages, a decree was entered and a sale made. Thereupon the judgment creditors intervened, insisting that in the distribution of the proceeds they were entitled to priority over the mortgage liens by virtue of the statute above referred to. The Circuit Court decided in their favor. 115 Fed. Rep. 184. Its judgment was taken on appeal to the Court of Appeals, from which court the case was brought here on certiorari.

Mr. Justice BREWER delivered the opinion of the Court.

It is contended that neither the plaintiff in the pending suit nor the bondholders whom it represents were parties or privies to the actions in the State court; that therefore the judgments of the latter court were not conclusive in the foreclosure proceeding as to the nature of the causes of action; that whether they were for torts or breaches of contract is for the determination of the Federal court, and further, that when the property passed from the old to the new water company it passed subject to the fifty-thousand dollar mortgage, and that under this statute, if applicable at all, only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence. On the other hand, it is contended that the statute deals with judgments—not claims for damages caused by negligence; that the decision of the State court as to the nature of the cause of action is as much a part of the judgment as the determination of the amount to be recovered; that a judgment which in terms is for damages caused by negligence, if entered by a court having jurisdiction, is made by the statute superior to any mortgage; that by the mortgage the mortgagee and the bondholders it represents agree to accept such judgment as conclusive and to subordinate their mortgage to its lien; that to hold that the transfer of property incumbered by a mortgage from one company to another puts that mortgage outside the statute practically destroys its beneficial intent; that such has been the holding of the Supreme Court of the State, and is a holding which the Federal courts will follow.

We shall assume, without deciding, that the nature of the causes of action upon which the State judgments were rendered is open for consideration in the Federal court in the foreclosure proceeding. The statute subordinates the mortgage to judgments for torts. Now what is the judgment? It is a determination that upon the facts stated the plaintiff is entitled to recover so much money. It may not be essential that it recite whether the facts

stated show a breach of contract or a tort, but it is essential that the judgment should be considered as a determination that upon those facts the plaintiff is entitled to recover. And it must be assumed that under the statute the mortgagee and the bondholders it represents agree to accept the judgment as conclusive in this respect, or if not conclusive, at least *prima facie* evidence. In this foreclosure proceeding the record of the proceedings in the State courts was introduced in evidence. Taking the Fisher case, for illustration, the complaint set out fully the contract made between the city of Greensboro and the water company, and the proceedings by which the title to the property passed from the one company to the other; alleged the destruction by fire of the plaintiff's property, and that he was free from all negligence in the matter. It added:

"The plaintiff alleges that the defendant company was culpably negligent and wilfully careless of its duty and obligations, both to the city of Greensboro and its inhabitants, under the said contract, and by virtue also of the duties, obligations and responsibilities which it assumed when it undertook to supply water to the city of Greensboro and its inhabitants for a stipulated price, which was paid to it by the said city."

It then set forth as matters of negligence on the part of the water company the "carelessly, wilfully and negligently failing to keep a sufficient quantity of water in its storage water tank in the said city of Greensboro, necessary for the purpose of extinguishing fire, together with the other uses to which it was applied;" also a failure "to keep its pumping engine ready at all times, and particularly on the day of the fire above referred to, to supply the needed fire pressure, in that it negligently failed to keep a suitable person at said engine or pumping house, or near the same, for the purpose of responding to the demands for water for the extinguishment of fire, and especially did it fail so to do at the time the property of the plaintiff was burned;" and closed with this averment: "That it was through no fault of the plaintiff that the said fire occurred, or that the same was not immediately extinguished; but that the negligence and omissions of duty, heretofore complained of on the part of the defendant company, was the proximate cause of the destruction of his property, whereby the defendant company becomes liable therefor."

The answer consisted mainly of denials in separate paragraphs of the averments in corresponding paragraphs of the complaint, specifically denying the validity of the contracts between the city and the original water company. Questions were submitted to the jury and answers returned, establishing the making of the contracts, the attempt on the part of the company to perform its stipulations, its failure to do so successfully, and also that the plaintiff was injured by the negligence of the defendant.

Upon this record the Supreme Court of North Carolina ruled that the action was one in tort, saying:

"We think the plaintiff was entitled to judgment as prayed for. There was an express and legal obligation upon the part of the defendant to provide and furnish ample protection against fires, and a breach of that obligation and a consequential damage to the plaintiff. Although action may have been maintained upon a promise implied by law, yet an action founded in tort was the more proper form of action, and the plaintiff *so declared.* He stated the facts out of which the legal obligation arose, fully, and also the obligation itself, and the breach of it and the damage resulting from that breach. Chitty on Pleading, vol. 1, page 155; Thompson on Corporations, vol. 5, sec. 6340." *Fisher* v. *Greensboro Water Supply Company,* 128 N. C. 375, 379.

From the conclusion thus reached we are not inclined to dissent and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested and for negligence in which he is liable in damages to such other parties. A company is chartered to construct and operate a railroad. Proceeding thereunder it constructs and operates its road. Nothing may be said in the charter in reference to the manner in which the road shall be operated or the particular acts which it must do. Yet without any such specification it is under an implied obligation to exercise reasonable care in both construction and operation. If from undue speed, failure to give proper warnings, or other like acts or omissions, individuals are injured, they may recover for such injuries, and their actions to recover sound in tort. Doubtless in the same transaction there may be negligence and breach of contract. If a railroad company contracts to carry a passenger there is an implied obligation that he will be carried with reasonable care for his safety. A failure to exercise such care, resulting in injury to the passenger, gives rise to an action *ex contractu* for breach of the contract, or as well to an action for the damages on account of the negligence—an action sounding in tort. But where there is no contract, and the injuries result from a failure of the corporation to exercise reasonable care in the discharge of the duties of its public calling, actions to recover therefor are strictly and solely actions *ex delicto.* Pollock, in his treatise, groups torts into three classes, in the last of which he specifies "breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings." Webb's Pollock on Torts, p. 7. This, it is said, implies the existence of some absolute duty not arising from personal contract with the other party to the action.

And here we are met with the contention that, independently of contract, there is no duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no

greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct waterworks and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences and omit making other and personal arrangements for a supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. "The fact that a wrongful act is a breach of a contract between the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby." *Osborne* v. *Morgan*, 130 Mass. 102, 104. See also *Emmons* v. *Alvord*, 177 Mass. 466, 470. An individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation, in the absence of contract, to assume the treatment of an injured person, but if he does undertake such treatment he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others. Holmes on the Common Law, p. 278. Even if the water company was under no contract obligations to construct waterworks in the city or to supply the citizens with water, yet having undertaken to do so it comes under an implied obligation to use reasonable care, and if through its negligence injury results to an individual it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort and not for breach of contract.

With reference to the contention that only the interest in the property acquired by the second water company was responsible for the damages caused by its negligence—a contention which, if sustained, would result in

giving priority to the fifty-thousand dollar mortgage—the argument is that by the statute "mortgages of incorporate companies . . . shall not have power to exempt the property or earnings of such incorporations . . . for torts committed by such incorporation;" that the torts were committed by the second water company; that its purchase was of the property of the first company, subject to the fifty-thousand dollar mortgage, and therefore over that property thus encumbered, and that only, were the judgments given priority. There is, doubtless, force in this contention. But this is not a penal statute, to be construed strictly, but remedial in its nature, and to be construed liberally, to carry into effect the intention of the legislature and provide the adequate remedy which it intended. The obvious purpose was to make the corporate property situate in the State security against torts committed by its owner, and it would materially impair if not wholly destroy the statute, and thus set at naught that purpose if the corporation constructing the plant could place a mortgage thereon for its entire value and then by sale to a new corporation enable the purchaser to use that property discharged of all substantial responsibility. In reference to a kindred question arising under the same statute the Supreme Court of North Carolina said in *Railroad Company* v. *Burnett*, 123 N. C. 210, 214, that under such construction "this statute would be a false light held out to such claimants to induce them to furnish material and labor—thinking they had a security, when in fact they had none."

It is more reasonable to hold that the statute imposes upon the investment made by a corporate company in its plant a responsibility for torts committed by it or any subsequent corporate owner, and that that responsibility cannot be avoided by any mortgage or other incumbrance voluntarily placed upon the property. Security to the individual citizen is to go hand in hand with the franchise and privilege granted by the State. We see no other question requiring notice, and the decree of the Circuit Court is

Affirmed.

Mr. Justice WHITE, Mr. Justice PECKHAM and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.